FILED
SEP 24 195
JOHN T. FEY, C

Supreme Court of the United States

October Term, 1956

No. 450

THE ITEM COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Attorney for Petitioner.

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Robert E. Leake, Jr.,
Of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	8
APPENDIX:	
Original Opinion of the Court of Appeals	15
Order Sought to be Reviewed	20

TABLE OF AUTHORITIES

Cases:

Aluminum Ore Co. vs NLRB, 131 F2d 485 (CA 7-1942) 9

Boston Herald-Traveler Corp. vs NLRB, 223 F2d 58 (CA 1-1955) 8, 13

Brooks vs Labor Board, 348 US 96 (1954) 7, 12

NLRB vs Allison Co., 165 F2d 766 (CA 6-1948), cert. den., 335 US 814 9

NLRB vs Boston Herald-Traveler Corp., 210 F2d 134 (CA 1-1954) 8, 13

NLRB vs Hekman Furniture Co., 207 F2d 561 (CA 6-1953) 9

NLRB vs Jacobs Mfg. Co., 196 F2d 680 (CA 2-1952) 9

PAGE

NLRB vs Leland-Gifford Co., 200 F2d 620 (CA 1-1952) 9
NLRB vs New Britain Machine Co., 210 F2d 61 (CA 2-1954) 8
NLRB vs Otis Elevator Co., 208 F2d 176 (CA 2-1953) 8
NLRB vs Whitin Machine Works, 108 NLRB 1537, aff'd, 217 F2d 593 (CA 4-1954), cert. den., 349 US 905 .....3, 7, 8
NLRB vs Woolworth Co., F. W., ...F2d .... (CA 9-1956) 3, 8, 11
NLRB vs Yawman & Erbe Mfg. Co., 187 F2d 947 (CA 2-1951) 9

Miscellaneous:

Bakke, Mutual Survival (Harper, New York, 1946) 10
Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harvard Law Review 389 (1950) 9
Cummins and DeVyver, The Labor Problem in the United States (Nostrand, New York, 1947) 10
Davey, Contemporary Collective Bargaining (Prentice-Hall, New York, 1951) 10
Gardner, Human Relations in Industry (Irwin, Chicago, 1947) 10
Gilbertson, Personnel Policies and Unionism (Ginn, Boston, 1950) 10
Hill and Hook, Management at the Bargaining Table (McGraw-Hill, York, Pa., 1945) .. 10
Lester, Labor and Industrial Relations (MacMillan, New York, 1951) 10

PAGE

Millholland, Pay Day (Ginn, New York, 1946) 11

Randle, Collective Bargaining (Houghton-Mifflin, Cambridge, Mass., 1951) 9, 10

Torff, Collective Bargaining (McGraw-Hill, New York, 1953) 10

Woytinsky, Labor and Management Look at Collective Bargaining (Twentieth-Century, New York, 1949) 10

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No.

THE ITEM COMPANY,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review an order of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW

The original opinion of the Court of Appeals, reported at 220 F2d 956, is printed in the appendix hereto. Certiorari to review the original judgment below was denied by this court on October 10, 1955, 350 US 836. The

decree of the Court of Appeals granted continuing injunctive and mandatory relief.

The order of that court now sought to be reviewed, denied a motion for modification of the court's pending decree. That order, not accompanied by an opinion, is also printed in the appendix hereto.

JURISDICTION

The order sought to be reviewed was rendered on September 6, 1956. Jurisdiction of this court lies under 28 USC 1254 and 29 USC 160(e).

QUESTION PRESENTED

The important question of federal statutory construction, novel in this court, presented for review is:

> Does the National Labor Relations Act require an employer, in bargaining with a union of which all affected employees (a newspaper's editorial staff) are members, to disclose detailed confidential information as to merit wage increases given, concededly without discrimination, to members of the union, when the question of merit raises had expressly been excluded from the subjects of bargaining, the desired information had no relevance to any phase of the bargaining, and the union could conveniently obtain the desired information from its own members if they were willing to disclose it?

The decree here sought to be reviewed is in direct conflict with the decision of the Court of Appeals for the

Ninth Circuit in *NLRB vs F. W. Woolworth Co.*,[1] with respect to which a petition for certiorari is now pending in this court.[2]

The importance of the question here at issue is pointed by the Labor Board's own recent comment on "the unusually large number of cases coming before the Board involving the issue", and on "the disturbing effect upon collective bargaining of the disagreements which" have arisen with regard to it.[3]

STATUTES INVOLVED

National Labor Relations Act, Section 8(a)(5), 29 USC 158(a)(5):

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees . . ."

National Labor Relations Act, Section 8(d), 29 USC 158(d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours

---

[1] .... F2d .... (CA 9-1956).

[2] No. 413. "The decision of the court below conflicts with decisions of the Courts of Appeals for the First, Second, Fourth and Fifth Circuits", citing the instant case among others. Petition for certiorari in *NLRB vs F. W. Woolworth Co.*, No. 413 on this court's docket, pp. 7-8.

[3] *NLRB vs Whitin Machine Works*, 108 NLRB 1537, aff'd, 217 F2d 593 (CA 4-1954), cert. den., 349 US 905. See note 1, p. 8, *post*.

and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

STATEMENT OF THE CASE

In late 1952, petitioner, the publisher of The New Orleans Item, began negotiations with the New Orleans Newspaper Guild, representing a group of its editorial employees, all members of the union, for renewal of their existing collective bargaining agreement.[4]

The expiring agreement, like all prior employment contracts which had been in effect between the parties over a period of many years, was a minimum-wage contract, under which granting of merit wage increases was expressly reserved as a prerogative of management.[5]

At the beginning of negotiations, the union requested petitioner to furnish it with detailed payroll information as to each employee, including the "date and amount of any merit increases in the past year".[6]

---

[4] R 57-60. The negotiations covered some employees other than those in the news department, but the latter alone are involved in the controversy at bar. R 58.

[5] R 60; App. 12, 21, 22-23, 41, 59-60, 65; Resp. Exhs. 2 and 3 (App. 93, 100). References herein to "App.", are to the portions of the record herein printed in the appendix to petitioner's (there respondent's) brief in the Court of Appeals, made part of the record in this court. References herein to "App. *post*", are to the appendix of the within petition for certiorari.

[6] R 59-61; App. 22; Resp. Exhs. 5 and 8 (App. 83-84, 101-103).

Petitioner furnished all of the information requested, except that petitioner refused to identify the specific merit increases given to particular employees by name.[7]

Petitioner's position in refusing to divulge this information was that, first, the information had no conceivable relevance to any subject of collective bargaining between petitioner and the union; and second, the information, which petitioner's employees had apparently refused to disclose to their own union, is held by petitioner in confidence for the employees concerned.

All fifty of petitioner's editorial employees of the group represented by the Guild were members of that union, and were centrally located in one building. The union made no attempt to show why it should not obtain the desired information from its own members, if they wished to reveal it.[8]

The union's position was that it needed the information to "determine whether the present contract is being properly applied";[9] but it is not disputed that petitioner has in fact never discriminated against union members or officers in the granting of merit wage increases.[10]

Nor is it disputed that the union has never bargained with petitioner as to merit wage increases, and that petitioner has always granted such increases unilaterally, as a conceded prerogative of management.[11]

---

[7] R 60; App. 7; Resp. Exh. 2 (App. 94), 6, 7 (App. 85-92).
[8] R 58; App. 24, 60, 61, 64.
[9] R 61; App. 11, 46-47; Resp. Exh. 5 (App. 83-84).
[10] App. 28-29, 39, 48, 66.
[11] R 60; App. 12, 21, 22-23, 41, 59-60, 65.

The present proceedings were initiated by the Guild in November 1952, by filing an unfair-labor-practice charge based on petitioner's refusal to furnish the information withheld.[12]

Several months later, in February 1953, petitioner and the union signed a new collective-bargaining agreement, which again recognized management's exclusive prerogative to grant merit wage increases, and pointedly did not require petitioner to notify the union of any such increases.[13]

Respondent's trial examiner nevertheless found that the disputed information was relevant "for administrative and policing purposes", specifically to enable the union "to determine whether (petitioner's) policy on merit increases disclosed any discrimination against union members".[14]

Respondent adopted the findings and conclusions of its trial examiner, and ordered petitioner to furnish to the union "the names identified with the respective merit increases, if any, granted to the employees in said unit during the preceding year, and the exact wages of each employee in the unit".[15]

[12] R 7-10, 61.

[13] R 61-62; App. 12, 22; Resp. Exh. 2 (App. 93-99).

[14] R 63. The trial examiner had himself stated expressly that "there is nothing in the record to show there has been any discrimination or even any alleged". App. 29. All employees involved were members of the union, and it had in fact been conceded throughout the hearing that petitioner had never discriminated in the granting of merit increases. See notes 4 and 9, *supra*.

[15] R 50-52.

On respondent's petition, the Court of Appeals held that the order should be enforced, on the ground that " 'wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement' ".[16]

Petitioner's contention that it should not be compelled to betray its employees' confidence by disclosure of wage information to their union, was rejected on the ground that " 'the underlying purpose of this statute (the National Labor Relations Act) is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.' " [17]

Certiorari to review this decision by the Fifth Circuit was denied by this court on October 10, 1955, 350 US 836. Pursuant to the decision, petitioner has periodically been furnishing the disputed wage information to the Union.

On June 25, 1956, the Court of Appeals for the Ninth Circuit rendered a decision directly contrary to that of the Fifth Circuit herein, on the question of necessity of

---

[16] 220 F2d at 958, App. *post*, p. 17. Quoting from the opinion by respondent itself in *NLRB vs Whitin Machine Works*, 108 NLRB 1537, aff'd, 217 F2d 593 (CA 4-1955), cert. den., 349 US 905.

[17] 220 F2d at 959, App. *post*. p. 19. Quoting from this court's opinion in *Brooks vs Labor Board*, 348 US 96, 103 (1954), involving informal repudiation by a majority of employees, of a union theretofore formally certified by the Board as bargaining agent of the group.

some showing of relevance of requested wage information to bargaining issues.[18]

On August 8, 1956, petitioner, in light of the Ninth Circuit decision, moved the Fifth Circuit to modify its pending enforcement order herein by rescission of any continuing application thereof. The motion was denied; and this petition seeks review of the order of denial.

Meanwhile, the Labor Board has filed a petition for certiorari to review the conflicting Ninth Circuit decision.[19]

ARGUMENT

The question of the extent of the right of unions to compel disclosure by employers, of wage information generally, is one of the most urgent current problems arising under the National Labor Relations Act.[1] In addition to the case at bar in the Fifth Circuit, the question has been considered in at least twelve other cases in six other circuits.[2]

---

[18] *NLRB vs F. W. Woolworth Co.*, ... F2d .... (CA 9-1956). See note 2, p. 3, *supra*.

[19] No. 413 on this court's docket.

[1] Respondent has itself been constrained to make recent mention of "the unusually large number of cases coming before the Board involving this issue", and of "the disturbing effect upon collective bargaining of the disagreements which arise" in this connection. *NLRB vs Whitin Machine Works*, 108 NLRB 1537, aff'd, 217 F2d 593 (CA 4-1954), cert. den., 349 US 905. See note 3 and text, p. 3, *supra*.

[2] *NLRB vs F. W. Woolworth Co.*, ... F2d ... (CA 9-1956); *Boston Herald-Traveler Corp. vs NLRB*, 223 F2d 58 (CA 1-1955); *NLRB vs Whitin Machine Works*, 217 F2d 593 (CA 4-1954), cert. den., 349 US 905; *NLRB vs Boston Herald-Traveler Corp.*, 210 F2d 134 (CA 1-1954); *NLRB vs New Britain Machine Co.*, 210 F2d 61 (CA 2-1954); *NLRB vs*

The facet of this over-all controversy which concerns the right of a union to enforce revelation of data as to merit wage increases is of particular importance.

This specific question, involved in this case, brings into sharp focus a basic conflict between the collective interest of a union on the one hand, and the several interests of its own individual members on the other.

A union can function efficiently only by bargaining for all of its members as an undifferentiated group, necessarily using only the highest common denominator for each category of all employees in the process.

This compelling collective interest of the union can rarely be reconciled with the several interests of its individual members seeking to forge their own advancements within the union beyond the common denominator which forms the motivating collective bargaining factor of the union without regard to individual merit.

That merit-raises are inherently an unrealistic subject for union-employer negotiation, on these very grounds, is strongly evidenced by customary exclusion of provision therefor from collective bargaining agreements, particularly, as here, for editorial employees in the newspaper field.[3]

Otis Elevator Co., 208 F2d 176 (CA 2-1953); *NLRB vs Hekman Furniture Co.*, 207 F2d 561 (CA 6-1953); *NLRB vs Leland-Gifford Co.*, 200 F2d 620 (CA 1-1952); *NLRB vs Jacobs Mfg. Co.*, 196 F2d 680 (CA 2-1952); *NLRB vs Yawman & Erbe Mfg. Co.*, 187 F2d 947 (CA 2-1951); *NLRB vs Allison Co.*, 165 F2d 766 (CA 6-1948), cert. den., 335 US 814; *Aluminum Ore Co. vs NLRB*, 131 F2d 485 (CA 7-1942).

[3] Cox, Archibald, and Dunlop, John T., *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harvard Law Review 389, 407-411, especially 409 (1950); Randle, C. Wilson, *Collective Bargaining* (Houghton-Mifflin,

Indiscriminate sanction of union constraint of employers to reveal merit-wage-increase information denied to the union by its own members, will inevitably tend to encourage collective bargaining on the issue, and concomitantly to discourage the stimulation of individual achievement among the members of the union within the union itself.

Documentation of the uniform hostility of union leadership to merit wage increases as tending toward inevitable impairment of their collective interests in favor of the individual interests of union members, and of the consequent inexpedience of such increases as a proper subject of collective bargaining, is found in contemporary treatises by leading authorities in the field of labor economics.[4]

Circumstances can hardly be envisaged in which grant to union leadership of access to such data against the will

---

Cambridge, Mass., 1951) 217; Davey, Harold W., *Contemporary Collective Bargaining* (Prentice-Hall, New York, 1951) 176. The subject was expressly excluded from the collective contract involved in the instant case. See footnotes 5 and 13, pp. 4 and 6, above, and accompanying text.

[4] Bakke, E. Wright, *Mutual Survival* (Harper, New York, 1946) 59-60; Torff, Selwyn H., *Collective Bargaining* (McGraw-Hill, New York, 1953) 179; Randle, C. Wilson, *Collective Bargaining* (Houghton-Mifflin, Cambridge, Mass., 1951) 218; Lester, Richard A., *Labor and Industrial Relations* (MacMillan, New York, 1951) 173; Gilbertson, Henry S., *Personnel Policies and Unionism* (Ginn, Boston, 1950) 159; Woytinsky, Wladimir S., *Labor and Management Look at Collective Bargaining* (Twentieth-Century, New York, 1949) 164; Gardner, Burleigh B., *Human Relations in Industry* (Irwin, Chicago, 1947) 315; Cummins, E. E., and DeVyver, Frank T., *The Labor Problem in the United States* (Nostrand, New York, 1947) 198; Hill, Lee H., and Hook, Charles R., Jr., *Management at the Bargaining Table* (McGraw-Hill, York, Pa., 1945) 125-126.

of the union's own members, could lead to aught but aggravated inter-employee dissension of the very nature which existing labor legislation is intended to deter.[5]

In the case at bar, the Fifth Circuit has declared adherence to respondent's view that such information should nevertheless be subject to compulsory disclosure without any showing of relevance, on bare request by the union.

When the Fifth Circuit first rendered its decision to this effect, no inter-circuit conflict was involved (although the Fifth Circuit's decision went far beyond any previous holding), and this court declined review.

In June of this year, however, the Ninth Circuit held, in direct conflict with the Fifth Circuit's decision herein, that disclosure of wage data should not be compelled in the absence of any showing of relevance to bargaining issues.[6]

The Fifth Circuit's subsequent refusal to modify its decree in light of the intervening contrary holding, presents a clear-cut conflict of circuits on this important question.[7]

---

[5] "It is the attitude, currently, of unionism to seek an average wage for all workmen of an industry, but to avoid singling out individual workmen for special compensation. Any such practice would immediately involve the leadership of the plant union in the unwelcome task of explaining to the larger part of its membership why the smaller part was thus favored." Millholland, Ray, *Pay Day* (Ginn, New York, 1946) 136.

[6] *NLRB vs F. W. Woolworth Co.*, ... F2d .... (CA 9-1956).

[7] A petition for certiorari to review the Ninth Circuit's decision is pending on this court's docket (No. 413). See notes 2 and 19, pp. 3 and 8, *supra*.

The Fifth Circuit's decision also represents a probable misapplication of this court's recent *dictum* that "to allow employers to rely on employees' rights in refusing to bargain with the formally designated union . . . is inimical" to the purposes of the Act at issue.[8]

The decision from which the *dictum* is quoted involved no breach of a confidential relationship; and the right of the employees there concerned—to decline representation by a certified union—was expressly recognized by this court to be one which the employees themselves could protect through proper action before the National Labor Relations Board, and which accordingly required no protection by the employer.

But employees would have no recourse whatever in their own right from an order forcing the employer to reveal to the union, wage information which the employees have themselves refused to disclose.

Only through appropriate action by the employer can employees be protected against such invasion of their rights by the union.

In this respect, the decision below is in conflict with the rationale of the First Circuit's approval of an employer's contention that "this case is inappropriate for disclosure of specific names and salaries because such disclosure violates not only the privacy of the employer but also the privacy of employees with respect to rates of pay, and we are not to assume that the Board would in-

---

[8] *Brooks vs Labor Board*, 348 US 96, 103 (1954). *Vide* note 17, p. 7, *supra*.

vade personal privacy without having some good reason which is lacking here, for the Respondent and the Union amicably reached an agreement, apparently satisfactory to both, without the benefit of specific individual wage data".[9]

It is respectfully submitted that allowance of certiorari herein is fully justified by the clear inter-circuit conflict involved, and by the legal and sociological significance of the question at issue in this case.

Eberhard P. Deutsch,
Attorney for Petitioner.

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Robert E. Leake, Jr.,
Of Counsel.

September, 1956.

---

[9] *NLRB vs Boston Herald-Traveler Corp.*, 210 F2d 134, 136-37 (CA 1-1954). The present position of the First Circuit on this question is, however, not clear in light of its more recent order in the same case for disclosure of individual merit-raise information without "the necessity of specific findings of relevance". *Boston Herald-Traveler Corp. vs NLRB*, 223 F2d 58 (CA 1-1955).